

Arbitration in Italy and around the world

A brief comparative overview of International and domestic arbitration: 4 key differences

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Arbitration is a common way of resolving commercial disputes in today's business landscape. Especially in instances of complex disputes, parties are increasingly turning away from national dispute forums and are instead entrusting one or more arbitrators with the task of settling their disputes.

The steady growth in popularity of arbitration can be observed both in the increasing volume of domestic arbitration proceedings, and in cross border situations, where it is commonly recognized as the most efficient means of ensuring independency and impartiality in disputes where the opposing parties are from different countries ¹.

While both domestic and international arbitration is based on common rules and principles, there are important distinctions between the two, particularly regarding the conduct and management of the proceedings. Therefore, in this brief article, we will attempt to outline four of the key differences between the two institutions: case management conferences; witness and written evidence; interim measures and costs of the proceedings.

Case management conferences

Prior to the commencement of International Arbitration proceedings, the arbitrators will commonly convene a case management conference. At this first meeting, the arbitrators, in conjunction with the parties, establish a number of procedural management guidelines, such as: (i) the identification of issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at the hearing; (ii) the limits and manner of the production of written evidence; (iii) the procedural

¹ The number of arbitration cases administrated by the Chamber of Arbitration of Milan grew from 102 in 2006 to 130 in 2011. The ICC's statistics demonstrate the same trend, showing an increase from 521 cases in 2005 to 796 cases in 2011.

timetable and (iv) the advance costs of the proceedings (Section 24 and Appendix IV of the ICC Arbitration Rules).

A case management conference, such as that described above, is not common practice in Italy, where the aforementioned matters are not clarified at the beginning of the process. However, Section 21, paragraph 3 of the Arbitration Rules of the Chamber of Arbitration of Milan outlines a timetable for the proceedings, which has been determined by arbitrators.

Witness and written evidence

Regarding witness evidence, the main differences between the two arbitration proceedings are: (i) the persons allowed to testify and ii) the method of taking statements.

On the first point, it should be noted that, according to Section 246 of the Italian Procedural Code, a person with an interest in the proceedings cannot be a witness. In accordance with this rule, an authorized representative is excluded from testifying in proceedings in which his or her company is involved. By contrast, in international arbitration, anyone can be appointed as a witness, including the authorized representatives of a company. The arbitrators will evaluate the reliability of such witnesses' statements.

With regards to the method of taking statements, domestic arbitration does not differ from an ordinary trial. As a consequence, the witness shall orally respond to previously admitted testimony during the hearing. However, in international arbitration proceedings, the following differences apply: (i) the attorney selects the facts and events that have to be testified to by his or her witnesses; (ii) the evidence consists of written statements; (iii) cross-examination is permitted.

Lastly, different rules also apply to the admittance of written evidence. In domestic arbitration, the judge is able to order the exhibition of a document upon demand of the requesting party and under the limits set forth in Section 210 of the Italian Procedural Code (i.e. clear identification of the document required). However, in international arbitration a document can be admitted under the parameters of IBA Rules following a more generic request for the exhibition of documents (as a form of mitigated discovery).

Interim Measures

As clearly stated in Section 818 of the Italian Procedural Code, the arbitrators are not entitled to issue interim and conservatory measures in domestic proceedings.

Conversely, this opportunity is usually granted in international arbitration proceedings. Almost all the leading European arbitration centers provide this power to arbitrators, who normally make the granting of the measure subject to an appropriate security provided by the requesting party (Section 28 of the ICC Arbitration Rules). The legal requirements surrounding the issuance of an interim measure are the same as those established in Italian courts, namely: (i) the existence, subject to a preliminary verification, of the right to enforce such a measure and (ii) the urgency of the measure's issuance. In addition, a reference shall be made to Section 29 of the ICC Arbitration Rules, according to which the party can also ask for an interim or conservatory measure before the constitution of the arbitral tribunal ("Emergency Measures").

Costs of the proceeding

In both domestic and international arbitration, the costs are determined by the arbitral institutions, or by the sole arbitrator or panel.

However, in contrast to Italian convention, in international arbitration the winning party is entitled to recover almost all the costs incurred as a result of the proceedings.

As stated in Section 37 of the ICC Arbitration Rules, as well as the fees and expenses of the arbitrators, and administrative expenses, the costs of the arbitration shall include all reasonable legal and associated costs incurred by the parties. Specifically, some of the latter costs can include: the use of interpreters and/or translators, the work of the internal attorney of the company, and the services of any experts appointed by the winning party.

One final remark: the costs of international arbitration can be significantly higher than those of domestic arbitration. By way of example, the administrative fees for a dispute with a value of EUR1,000,000 under Chamber of Arbitration of Milan and ICC Arbitration rules can total EUR8,000 or EUR21,715 respectively.

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Considering all of the above, and especially in the case of large, complex disputes with international aspects, it may well be worth using international arbitration, which, despite its high costs and significant advances in the conduct and management of domestic arbitration, still appears to be the most sophisticated and efficient tool with which to settle disputes.